WESTERN DISTRICT OF VIRGINIA SEVENTH ANNUAL BANKRUPTCY CONFERENCE
RECENT DEVELOPMENTS IN CHAPTER 13 RELATED CASE LAW
JUNE 4, 2021

[Cases updated through 5/18/21]

U.S. SUPREME COURT

S60. **Obduskey v. McCarthy & Amp; Holthus LLP**, 139 S. Ct. 1029 (3/20/19), (Bryer) **Non-judicial foreclosure agent is not is not a "debt collector" under the FDCPA.** Facts: Law firm McCarthy & Holthus LLP was hired to carry out a nonjudicial foreclosure on a Colorado home owned by petitioner Dennis Obduskey. McCarthy sent Obduskey correspondence related to the foreclosure. Obduskey responded with a letter invoking a federal Fair Debt Collection Practices Act (FDCPA or Act) provision, 15 U. S. C. §1692g(b), which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. Instead, McCarthy initiated a nonjudicial foreclosure action. Obduskey sued, alleging that McCarthy failed to comply with the FDCPA's verification procedure. The District Court dismissed on the ground that McCarthy was not a "debt collector" within the meaning of the FDCPA, and the Tenth Circuit affirmed. Held: A business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of §1692f(6). Pp. 6-14.

S61. **Taggart v. Lorenzen,** 139 S. Ct. 1795, (6/3/19), Opinion (Breyer, 9-0). **Standard for finding contempt for violation of the discharge injunction, Code sec. 524.** In a unanimous ruling, the Court "struck a middle ground on the standard for finding contempt in cases of violation of the discharge injunction." The case began with an agreement to allow post-discharge litigation to proceed, subject to an agreement that the debtor would not be personally responsible for any ultimate judgment. It evolved, however, into litigation over the debtor's responsibility for attorney fees in the litigation, based on the notion that he had "returned to the fray."

The Court stated that: "We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful."

The decision leaves open the question of whether the *Taggart* standard applies to violations of the automatic stay. Justice Breyer sidestepped that issue, but could not resist considering it: "The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1). This language, however, differs from the more general language in section 105(a) … The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period."

In the process, the Court rejected a strict liability standard for discharge violations, proposed by the debtor by analogy to the standard applicable to automatic stay violations. Under the automatic stay, and in contrast with section 524's silence on the subject, subsection 362(k) specifically provides for damages in certain specific circumstances, described above.[9] "These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection.

The case was remanded to determine whether those facts supported a finding of contempt under the newly-enunciated standard. [Case summary reprinted from a 6/17/19 article by Lawrence R. Ahern, III, on the NACTT Academy website.]

S62. **Ritzen Group v. Jackson Masonry,LLC**, 140 S. Ct. 582, (1/14/20), (Ginsburg). [Chapter 11 case] **Denial of a motion for relief from the automatic stay is a final, appealable order.** Issue: Does a creditor's motion for relief from the automatic stay initiate a distinct proceeding terminating in a final, appealable order when the bankruptcy court rules dispositively on the motion? Held: "the adjudication of a motion for relief from the automatic stay forms a discrete procedural unit within the embracive bankruptcy case. That unit yields a final, appealable order when the bankruptcy court unreservedly grants or denies relief." The Court distinguished this issue from that in Bullard. "Because the appropriate "proceeding" in this case is the adjudication of the motion for relief from the automatic stay, the Bankruptcy Court's order conclusively denying that motion is "final." The court's order ended the stay-relief adjudication and left nothing more for the Bankruptcy Court to do in that proceeding."

S63. ***Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, et al.*, 140 S. Ct. 696 (2/24/20).** In a per curiam decision February 24, 2020, , arising out of a suit removed from the Puerto Rico courts to the United States District Court, the Supreme Court first held that until the District Court formally remanded the suit, the Puerto Rico courts had no jurisdiction, citing 28 U.S.C. § 1446(d)'s provision that "the State court shall proceed no further unless and until the case is remanded." Orders entered by the Puerto Rico Court prior to the remand were void. Next, the Supreme Court observed that the District Court's remand order was not effective to a prior point in time simply because it was said to be a *nunc pro tunc* order. Such orders must reflect the reality of what has already occurred, rather than attempt revisionist history; *nunc pro tunc* orders "cannot make the record what it is not," quoting Missouri v. Jenkins, 495 U.S. 33, 49 (1990). The lesson here is that *nunc pro tunc* orders must reflect what has already happened in the federal courts or what the federal court has already ruled upon, rather than attempt to back date effectiveness to a prior point in time. In bankruptcy practice, *nunc pro tunc* orders have been seen in various contexts, including approval of employment of counsel, and the Supreme Court's decision places doubt on reliance upon such orders to make something retroactively effective to a prior point in time. [Summary by Judge William H. Brown, NACTT Academy website]

S64. ***Rodriquez v. Federal Deposit Insurance Corp.*, 140 S. Ct. 713, (2 25/20), State common law to be preferred over federal common law in determining property rights.** A unanimous opinion by Justice Gorsuch, the Court discouraged federal courts' creation of or reliance upon federal common law when there is applicable state law to determine the issue. Here, the suit involved a Chapter 7 trustee and contested ownership of a federal tax refund. The lower courts had applied a rule that relied on federal common law, and the Court observed that "the cases in which federal courts may engage in common lawmaking are few and far between." The lesson seems to be that if there is applicable state law that could determine the contested issue, federal courts must not ignore that law in favor of federal common law theories. Quoting *Butner v. United States*, 440 U.S. 48, 54 (1979), the *Rodriquez* opinion reminds us that "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." [Summary by Judge William H. Brown, NACTT ACADEMY website]

S65. **City of Chicago v. Fulton, et al**, #19-357, (1/14/21), **362(a)(3) does not require the city to automatically turn over to the debtor a vehicle impounded for non-payment of parking tickets.** Chapter 13 debtors' cars had been impounded by the City of Chicago for unpaid parking tickets. After their Chapter 13 cases were filed, they requested that the City return the vehicles. The City refused. The Bankruptcy Court held that the refusal was a violation of the automatic stay. The Seventh Circuit affirmed, ruling that by retaining possession the City had exercised control over the debtors' property in violation of Code sec. 362(a)(3). Held: (1) Mere retention of estate property after filing does not violate sec. 362(a)(3). That provision "prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." (2) The Debtor's position creates 2 problems: it would render sec. 542's command to deliver estate property to the Trustee "largely superfluous," and it would render the commands of 362 and 542 "contradictory." An entity would be required to turn over property under 362 even if it were exempt from turnover under 542. (3) When 36(a)(3) was amended to add "or to exercise control over property of the estate," there

was no mention of transforming it into an "affirmative turnover obligation." (4) The opinion is vacated and the case is remanded.
---Sotomayor concurrence: The Court has not decided whether 362(a)'s other provisions may require a creditor to return a debtor's property, and has not addressed how bankruptcy courts should go about enforcing creditors' separate obligation to deliver estate property to the trustee or the debtor. Debtors must have regular income to be in Chapter 13, and for many having a car is essential to maintaining employment. This vicious cycle is especially true for many low income debtors. Even though Court is holding that 362(a)(3) does not require creditors to turn over impounded vehicles, the Court is leaving open the possibility of relief under 542(a). But turnover proceedings "can be quite slow," often averaging over 100 days. So some courts are allowing it by simple motion (not an adversary proceeding), and some have made the turnover obligation automatic. Ultimately any such gap in obtaining relief "is best addressed by rule drafters and policymakers, not bankruptcy judges."

[Note: **Hardship Discharge in student loans cases:** The Supreme Court is presently considering whether or not to grant *certiorari* in the case of McCoy v. U.S, #20-886. This case is an example of the harsh impact of Brunner v. New York State Higher Education Services Corp, 831 F.2d. 395 (2nd Cir. 1987), which for more than three decades has made it difficult to obtain a discharge of student loans under the "undue hardship" standard of section 523(a)(8).]

FOURTH CIRCUIT

F72. **Martineau v. Wier**, 934 F.3d 385 (4th Cir. 8/12/19) (**Chapter 7 case) Neither standing nor judicial estoppel issues prevented a Debtor from pursuing a pre-petition tort action after she received her discharge.** After receiving a Chapter 7 discharge, Debtor filed a federal court action to rescind a settlement agreement and award that occurred before she filed her Chapter 7 case; she alleged that it was fraudulently induced. The Debtor reopened her bankruptcy case, disclosed the asset, and the Trustee abandoned it. The District Court found that she lacked standing because the tort claim was the property of the Chapter 7 estate, and judicial estoppel prevented her suit because she had failed to disclose it in her bankruptcy schedules. The Fourth Circuit vacated the ruling and remanded the case. (1) Her suit satisfied the Article III requirements for standing. (2) The issue was not standing, but whether she was entitled to pursue these claims on her own behalf. Because the Trustee abandoned the estate's interest in the suit after it was filed, the claim belonged to her. (3) Regarding judicial estoppel, the District Court short circuited the inquiry by assuming she acted in bad faith by failing to schedule the claim. Such a presumption was unwarranted where there was no pending lawsuit and the Trustee had abandoned the claim, and because it would benefit defendants who may have committed fraud.

F72A. ***Wells Fargo Bank, N.A. v. Highland Constr. Mgmt. Servs., L.P.*, 2020 U.S. App. LEXIS 9864 (4th Cir. Mar. 30, 2020) (Wynn, J.) Authority to assign a membership interest in an LLC; nature of that asset.** *Background:* Pre-petition, the debtor, Highland Construction Management Services, LP ("Highland Construction") executed a security agreement in favor of Wells Fargo Bank, N.A. ("Wells Fargo") for the benefit of Jerome Guyant IRA ("Guyant IRA"). Pursuant to the agreement, Highland Construction assigned 50% of its interest in Sanford LLC to Guyant IRA. Highland Construction had a 20% membership interest in Sanford LLC, and it contends that it assigned to Guyant IRA 10% membership interest in Sanford. Guyant IRA, on the other hand, argued that Highland Construction assigned to it 16% of all funds it received

from distributions from Sandford LLC, which was made up of not only the 10% assigned to it, but also 6% based on Highland Construction's interest in a second LLC, which also had membership interest in Sanford LLC, characterized by Guyant IRA as an "indirect" interest. The Bankruptcy Court rejected the argument put forth by Guyant IRA and concluded that Highland Construction assigned 50% of its 20% interest in Sanford, LLC (so 10%). On appeal, the District Court affirmed.

Affirmed. Membership interest in an LLC is personal property and so when Highland Construction assigned 50% of its membership interest in Sanford, LLC it assigned a portion of its own property. Even though Highland Construction was a member also of another LLC, which also had an interest in Sanford, LLC, it had no authority to assign, and did not assign, the other entity's interest in Sanford, LLC. That was not its property to assign. In addition, none of the documents related to the transaction, including various amendments, supported the argument put forth by Guyant IRA (it was relying on a contract recital, which is merely an explanation of the reasons for entering into an agreement or the background of a transaction and such recitals are not binding on parties unless there is ambiguity in the document).

F73. **Copley v. United States**, 959 F.3d 118 (4th Cir. 5/12/20), **(Chap. 7 case). IRS right of set-off prevails over Debtors' attempt to exempt the tax refund under Virginia law.** Chapter 7 debtors attempted to exempt under Virginia law their right to a prepetition federal income tax overpayment refund. After the bankruptcy filing, the IRS set off the overpaid funds to satisfy the debtors' tax liabilities under 26 U.S.C. § 6402. In a matter of apparent first impression, the Fourth Circuit held that the exempt status of the refund did not prevent the IRS from applying the amount of the overpayment to the debtors' prior tax liabilities....Analysis: (1) Code subsection 522(c) says that exempt property cannot be used to satisfy "any" of the bankruptcy debtor's prepetition debts. The Copleys looked to this provision as they claimed an exemption in a tax refund and convinced the Bankruptcy and District courts that it rendered their refund immune to setoff of prepetition taxes. (2) However, in another provision applicable to the analysis, subsection 553(a) provides: "Except as otherwise provided in this section and in sections 362 and 363 of this title, *this title does not affect any right of a creditor to offset a mutual debt* owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case." (3) The debtors' interest in the tax overpayment, even if exempt, became property of the bankruptcy estate and the fact that the overpayment was subject to potential setoff did not exclude it from the estate. However, the IRS's right to offset the refund superseded the debtors' right to exempt their refund under section 522. (4) Section 553(a) alone does not create a setoff right, but the Fourth Circuit looked to subsection 6402(a) of the Internal Revenue Code, which it described as "[w]ithout qualification," providing the Service with setoff rights against "any overpayment." (5) The court concluded that the "fresh start" policy does "not require a debtor's right of exemption to supersede a creditor's right of offset." (6) while it is true that bankruptcy courts historically have had some discretion to disallow a setoff, that power is not unlimited and a Bankruptcy Court does not have discretion to "disregard the plain language of 26 U.S.C. § 6402(a) and 11 U.S.C. § 553(a). [Summary from the NACTT Academy "Consider Chapter 13" website.]

F74. **Ayers v. U.S. Dep't of Def**., #19-2230, pages 3-5, (4th Cir. Sept 2. 2020) (Unpublished) **Bankruptcy Court's order deemed not to be a final, appealable order.** "The traditional rule of finality is applied "in a more pragmatic and less technical way in bankruptcy cases than in other situations." In re Amatex Corp., 755 F.2d 1034, 1039 (3d Cir. 1985). For an otherwise interlocutory bankruptcy court order to be reviewable on appeal, it must finally resolve an adversary proceeding, controversy, or entire bankruptcy proceeding on the merits and leave nothing for the court to do but execute its judgment. See In re Abingdon Realty Corp., 634 F.2d 133, 135 (4th Cir. 1980); see also In re Saco Local Dev. Corp., 711 F.2d 441, 445 (1st Cir. 1983) (holding that order "that conclusively determine[s] a separable dispute over a creditor's claim or priority" is an appealable, final order in a bankruptcy case). "Orders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case." Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586 (2020) (citing Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1692 (2015)).

Adversary proceedings "are essentially full civil lawsuits carried out under the umbrella of the bankruptcy case." Bullard 135 S. Ct. at 1694.

Contrary to the District Court's conclusion, we find that the bankruptcy court's order is not a final, appealable order, despite the more pragmatic approach to finality in the context of bankruptcy court orders. Here, the "discrete dispute" is the adversary proceeding itself, not a particular claim within that proceeding. See In re Boca Arena, 184 F.3d 1285, 1286 (11th Cir. 1999) ("In bankruptcy, adversary proceedings generally are viewed as 'stand-alone lawsuits,' and final judgments issued in adversary proceedings are usually appealable as if the dispute had arisen outside of bankruptcy.") (internal citation omitted). Nor does the order "conclusively determine" a separable dispute as to the Government's claim in Ayers' bankruptcy proceeding. The bankruptcy court's order allowed Ayers to file an amended complaint in order to support her claim for a discharge under 11 U.S.C. § 523(a)(8) on the grounds of undue hardship. The bankruptcy court may find, after Ayers files an amended complaint, that she meets the standard in § 523(a)(8); in that case, her appeal as to the dismissal of the other counts will be moot.

Accordingly, we dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process."

F75. United States v. McCoy, #20-4268, pages 2-3 (4th Circ. 11/6/20)(citations omitted) **Standard for finding criminal contempt under 18 U.S.C. sec, 401(3).** The Fourth Circuit affirmed a finding of criminal contempt with a 4 month sentence for a Debtor's failure to comply with the Bankruptcy Court orders.

"A defendant challenging the sufficiency of the evidence faces a heavy burden … 'In assessing the sufficiency of the evidence presented in a bench trial, we must uphold a guilty verdict if, taking the view most favorable to the Government, there is substantial evidence to support the verdict. Substantial evidence means evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'"

"In order to be convicted of criminal contempt under 18 U.S.C. § 401(3), the court must find: '(1) a reasonably specific order; (2) violation of the order; and (3) the willful intent to violate the order … One may be found in contempt under § 401(3) only if [he] willfully violated a decree that was clear and left no uncertainty in the minds of those that heard it.' We have reviewed the record and find that the evidence here amply supported each of these elements. The bankruptcy court's orders clearly specified what was expected of McCoy and he clearly—and repeatedly—violated each of those orders and did so willfully. Therefore, the district court properly found that McCoy's conduct constituted criminal contempt beyond a reasonable doubt … Criminal contempt has no statutory maximum and can be treated as either a felony or as misdemeanor … The length of a sentence for contempt thus rests in the sound discretion of the court …"

F73A. **Askri v. Fitzgerald,** 612 B.R. 500 (E.D. Va. 2020) (Ellis, III, J.) (affirmed by 4th Circuit July 27, 2020) **(Chap. 11) Bad faith, conversion, and appeal.** Background**:** Debtor filed for chapter 11 relief. The Bankruptcy Court converted the case to one under chapter 7 pursuant to § 1112(b), which provides that a bankruptcy court shall convert a chapter 11 case to one under chapter 7 or dismiss the case, whichever may be in the best interests of creditors and the estate. This requires a two-step analysis by a court: (a) consideration of whether cause exists to either dismiss or convert; and (b) consideration of which option is in the best interest of creditors and the estate. Here, the Bankruptcy Court made factual findings in concluding the case should be converted to chapter 7, including that the debtor was a repeat filer of bankruptcy petitions who filed the case in bad faith as part of scheme to delay or hinder his creditors from foreclosing on his property. In addition, he could not show that he could propose a feasible reorganization plan and the Bankruptcy Court found that the debtor had offered no proof of income that could be verified. The Bankruptcy Court entered an order converting the case and entered a separate order denying approval of the proposed Disclosure Statement submitted by the debtor. Holding: Affirmed. The Bankruptcy Court had factual findings supporting its conclusion that the case was filed in bad faith and the debtor could not submit a feasible plan. In addition, the Court found that

conversion rather than dismissal was appropriate since there may be equity in the property for the benefit of creditors. With respect to the debtor's appeal of the Bankruptcy Court's decision to deny approval of the Disclosure Statement, the Court found this order to be interlocutory and an appeal should not be granted since the disclosure statement would play no role in a chapter 7 case.

F76. **Wood v. US Dept. of HUD (In re Larry and Jessica Wood)**, #20-1161, (4th Circ. 4/7/21) (opinion by Wilkinson). **(Chap. 7 case) The Federal government's right to set off under sec. 6402(d) and 553(a) supersedes the debtors' exemption rights under 522, but it must obtain relief from the stay to enforce that right.** Facts: Debtors financed the purchase of a mobile home, then defaulted on that loan. The US Dept. of Housing and Urban Development ("HUD"), which had insured the loan, paid the outstanding amount and then issued a demand for payment against the debtors. In 2017 it sent a "Notice of Intent to Collect by Treasury Offset," and offset the debtors' 2017 tax overpayment toward satisfaction of the debt. The debtors then filed a Chapter 7 case and sought to exempt any potential 2017 tax overpayment. The IRS did, in fact, offset the debtors' tax refund against the debt to HUD after they filed their 2017 taxes. The W. Va. Bankruptcy Court ruled that the debtors' tax overpayment became property of the estate and was therefore protected by the automatic stay, and that the debtors could exempt the overpayment and defeat the government's sec. 553 right to setoff. On appeal, the District Court agreed with the Bankruptcy Court's holdings, and denied the government's request for relief from the automatic stay because the IRS knowingly intercepted the overpayments after the bankruptcy case was filed. Held: (1) In *Copley v. US,* 959 F.3d 118 (4th Cir. 2020), we held that the Code gives the IRS' right of setoff a "special priority" against a bankrupt debtor's exemption rights, and that exemption rights in sec. 522 "do not prevail over the government 's 26 USC sec. 6402(d) right to offset mutual debts." (2) Though the government "exercised this right to hastily, before first requesting relief from the automatic stay," we see no reason to "abridge the government's right under 362(d)" to file a motion seeking to lift the stay. (3) The judgment of the District Court is reversed, and the case is remanded for further proceedings. (4) The debtors' bankruptcy estate included their tax overpayment even though the IRS currently holds those funds. (5) Unlike sec. 6402(a), which gives the Secretary of the Treasury the *discretion* to credit any tax overpayment against any "liability in respect of an internal revenue tax," sec. 6402(d) *requires* the Secretary to reduce the amount of any tax overpayment once the Secretary has been notified of a past-due legally enforceable debt owed to any Federal agency. (6) So the "case for statutory setoff is even stronger here for 6402(d) than it was in *Copley* for 6402(a)." (6) Sec. 553 preserves this right of setoff in bankruptcy; it "is not an independent source of law governing setoff." See *Citizens Bank of Md. V. Stumpf.* (7) Setoffs in bankruptcy have been "generally favored, and a presumption in favor of their enforcement exists." (7) The Treasury's right to exercise its right to offset the tax overpayment is "anchored firmly in sec. 6402(d) and 553(a)," and it "supersedes the general exemption protections of 522(c)." The debtors have no right to demand turnover of the overpayment. (8) Sec. 362(a)(7) operates as a stay on the right of setoff. By unilaterally remitting the overpayment to HUD, the Treasury "did exactly what the Code forbids," and it violated the automatic stay. (9) Sec. 362(b)(26) carves out a narrow exception for setoffs *against an income tax liability;* that does not cover this instance. (10) In *US v. Reynolds*, 764 F.2d 1004, we harmonized sec, 553(a), 362(a), and 362(a)(7) by saying that the creditor's right to setoff is preserved but it must seek relief from the automatic stay from the Bankruptcy Court to exercise that right. See also *Stumpf.* (11) Actions taken in violation of the stay are "presumptively invalid," but the stay can be "retroactively annulled, thus legitimizing the creditor action." (12) So the government should seek relief from the stay, and, "barring exceptional circumstances," such a motion should "ordinarily be granted," and the lower court must give "proper weight to the government's rights under 6402(d)."

F77. **Siegel v. Fitzgerald**, 4th Cir., No. 19-2240, 4/29/21 Opinion (King). **(Chapter 11) US Trustee vs. Bankruptcy Administrator Chapter 11 fees, non-uniformity of such fees as a constitutional issue, and retroactive application of Code amendments.** The issue in these consolidated cases was the constitutionality of quarterly fees assessed against Chapter 11 debtors under the 2017 Code amendment, and whether the lack of uniformity between the fees assessed by those Courts administered by the Bankruptcy Administrator (North Carolina and Alabama) and those administered by the US Trustee (all other states) violated the Constitution. The Fourth Circuit upheld the position of the US Trustee in both matters. It reversed the Richmond Bankruptcy Court's opinion that the US Trustee's fees were unconstitutional,

found no violation of the uniformity requirement contained in the Bankruptcy clause of the US Constitution (Art. 1, sec. 8, clause 4), and found no violation of the uniformity requirement contained in the Congressional taxing power clause of the Constitution (Art.1, sec. 8, clause 1). The opinion discusses in some detail these constitutional issues, other challenges to the 2017 amendment, the history and funding of the US Trustee program, and retroactive application of such amendments. A lengthy dissent discusses the reality of "two types of bankruptcy courts in the United States," the unconstitutionality of this non-uniformity in fees, and its effect on unsecured creditors.

WESTERN DISTRICT OF VIRGINIA BANKRUPTCY AND DISTRICT COURTS

B235. **Tolbert v. Young (In re Young), #18-71543; A.P. No. 18-07045 (6/17/19) (Judge Black)** [Chap. 7 case] **Non-dischargeability issues—breach of contract and damages to property—sec. 523(a)(2)(A), 523(a)(6), and 727(a)(4)(A**). Pro se creditor filed an adversary proceeding objecting to the dischargeability of a debt owed by the Debtor and alleging that the Debtor made false oaths on his bankruptcy schedules and tax returns. At issue is whether damages arising from an alleged breach of contract and costs of repair of damages to property are excepted from discharge under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6) and whether the Debtor made false statements pursuant to 11 U.S.C. 727(a)(4)(A) thereby justifying a denial of discharge. The Court held that the creditor failed to show by a preponderance of the evidence that any of the Debtor's actions justify denial of discharge related to the allegations that the debt was "obtained by false pretenses, a false representation, or actual fraud." The Court also denied the creditor's claim that the debts were "for willful and malicious injury by the debtor to another entity or to the property of another entity." The Court found that the Debtor acted neither maliciously nor with willful intent to damage structures and items in the residence. Minor damages were a result of mere wear and tear or negligent upkeep and other damage did not meet the test to be declared non-dischargeable. Finally, the Court held that the Debtor's failure to disclose certain income on his schedules was an inadvertent omission of non-material issues that did not meet the standard to deny the Debtor a discharge under Section 727(a)(4)(A). [Case summary from Court website]

B236. **Clevinger v. Buchanan General Hospital (In re Clevinger), #18-71263, A.P. No. 19-07008 (6/13/19)(Judge Black)**. **[Chap. 7] 90 day look-back period for preference recovery under sec. 542 and 547.** The Debtor claimed as exempt on Schedule C garnished funds as an avoidable preference pursuant to Virginia Code § 34-4 and then filed a complaint seeking to avoid and recover what he claimed was a preferential transfer to the judgment creditor under 11 U.S.C. §§ 542 and 547. The creditor argued that the transfer of funds occurred outside the 90-day preference period. Following *In re Wilkinson*, 196 B.R. 311 (Bankr. E.D. Va. 1996), the Court found that the relevant transfer date for the purpose of § 547(b) was the date that the garnishment lien attached to the Debtor's wages under Virginia law. Here, the Debtor earned his wages and his employer paid those withheld funds to the General District Court, all prior to the start of the 90-day preference period. Therefore, the Court denied the Debtor's request to recover the funds under § 547(b). [Case summary from Court website]

B237. **In re Anderson, 603 B.R. 564, (Bankr. W.D. Va. 6/10/19), [Chap. 7] Debtor could protect T by Es property where IRS tax lien had attached solely because of the debtor's liabilities.** Chapter 7 Debtor claimed an exemption in real property owned as tenants by the entireties with his non-filing spouse, to which the Chapter 7 Trustee objected. The property was subject to at least two IRS tax liens, so the Trustee sought to sell the property for the benefit of the IRS citing *United States v. Craft*, 535 U.S. 274 (2002), after negotiating a "carve out" of a portion of the sale proceeds for the benefit of the Debtor's unsecured creditors under 11 U.S.C. § 363(h). The Court held that the Debtor may exempt the property held as tenants by the entireties under 11 U.S.C. § 522 where a tax lien has attached to the property for liabilities owed only by the individual debtor and overruled the Trustee's objection. The Court then ordered the Trustee to abandon the property as any proposed sale of the property – which was over-encumbered by a deed of trust and IRS

tax liens – would not benefit general unsecured creditors and would instead create significant harm to the co-owner of the property. [Case summary from Court website]

B238. **In re Martha Price, # 18-71260, (Bankr. W.D. Va. 7/3/19) (Judge Black). Court declines to extend time to file a claim under Rule 3002(c)(6) due to initially incorrect creditor mailing address.** The Trustee filed an objection to a claim that was filed late. The claimant then filed a motion to extend time to file the claim asserting that, because the Debtor provided an incorrect address for the claimant when she filed her petition, the claimant received delayed notice of the filing and of the section 341 meeting of creditors and should be allowed to file her claim late pursuant to Rule 3002(c)(6). The post office discovered the mistake and put the incorrectly addressed notice in the claimant's post office box such that she received the notice prior to the first meeting of creditors. The claimant appeared at the section 341 meeting of creditors, but did not file her proof of claim until almost five months after receiving notice. The issue before the Court is whether the Debtor's failure to include a correct address for the claimant warrants an extension of time for the claimant to file her proof of claim under Rule 3002(c)(6). The Court held that the Claimant had sufficient notice giving her a reasonable time to file her proof of claim. Therefore, the Court sustained the Trustee's objection to the claim and denied the claimant's motion to file the claim late. [Court website summary]

Ralls v. Fed. Nat'l Mortg. Ass'n, 318-cv-110, (Dist. Ct., W.D. Va., 8/12/19 Opinion (Conrad). **(Fraud and breach of contract action). Fraud claim against foreclosing creditor survives 12(b) motion, but breach of oral contract does not.** Ralls obtained a refinance loan from Countrywide Home Loans, Inc. in 2005. When he fell behind in 2017, the servicer, Seterus, initiated foreclosure proceedings. Ralls alleged that (i) he was advised incorrectly of the foreclosure date, (ii) he made arrangements to have the necessary funds wired to Seterus by the date he'd been told, (iii) when at the last minute he found out that the sale would be two days earlier, he called Seterus, (iv) he was told that the sale could be undone after the fact if he wired the necessary funds soon thereafter, (v) based on that assurance he decided not to file Chapter 13 to stop the sale, (vi) he was incorrectly told that the funds he actually wired that day would be sufficient to stop the sale, and (vii) these assurances were intentionally false and fraudulent. The suit was initially filed in state court, and removed by Fannie Mae and Seterus to this Court. The Defendants filed a 12(b) motion seeking dismissal of the case. Held: (1) Virginia substantive law controls the actual fraud claim, and Ralls' claim "constitutes a sufficient predicate" for fraud. His claim is not barred by Virginia's "economic loss" or "source of duty" rule. (2) His claim of breach of a bilateral oral contract must fail because a promise to pay an amount already due is not valid consideration to support such a contract. (3) The motion is granted in part and denied in part.

B238A. **Midland Funding, LLC, et al, v. Thomas, 606 B.R. 687 (W.D. Va. 8/13/19), (appealing #17-AP-05010 and 17-AP-0509), (Dillon). Bankruptcy Court correctly denied defendants' request to require arbitration over alleged violations of Rule 3001.** Midland moved to compel plaintiffs and putative class representatives to arbitrate their claims that Midland violated FRBP 3001 and the Fair Debt Collection Practices Act (FDCPA) by filing incorrect proofs of claim for defaulted credit card debt. The Bankruptcy Court denied Midland's motion, and Midland appealed to this Court. Held: (1) The Bankruptcy Court's order that plaintiffs' requests for sanctions pursuant to Rule 3001 is not subject to arbitration is affirmed. (2) No opinion is expressed as to whether the FDCPA claim should be arbitrated; the lower Court expressly reserved ruling on that issue. (3) An order favoring litigation over arbitration is immediately appealable pursuant to the Federal Arbitration Act (FAA). (4) There is no automatic right to an interlocutory appeal for a motion to strike class action allegations, and Midland failed to move for leave of court to file an interlocutory appeal as to this issue. 28 U.S.C. sec. 158(a)(3); Rule 8004(a). (5) The doctrine of pendant appellate jurisdiction cannot be used "to append issues to an already existing interlocutory appeal." (6) Whether a Bankruptcy Court has the discretion to deny a motion to compel arbitration is a question of law that is subject to *de novo"* review. If it did have discretion, its exercise of it will be reviewed only for abuse of discretion. (7) The Bankruptcy Court had that discretion, and did not abuse it. (8) The Fourth Circuit has stated that the Supreme Court has resolved the tension between the FAA and another statute by holding that one seeking to prevent enforcement of an arbitration agreement must show that Congress evinced an intention to "preclude a waiver of judicial remedies for the statutory rights at issue." (8) The key inquiry is whether compelling arbitration would undermine the Bankruptcy Code's purpose of facilitating efficient reorganization of an estate. (9) The

alleged violations of Rule 3001 are not private causes of action; Rule 3001 entrusts the Court with discretion to enforce certain minimum standards for proofs of claim. Allowing an arbitrator to enforce those requirements would conflict with the purposes of the Code. (10) The Bankruptcy Court did not abuse its discretion by retaining jurisdiction over the FDCPA claims. Midland can renew its arguments after that Court resolves the Rule 3001 issue. (11) The Court lacks jurisdiction over the issue of class action waiver.

B238B. **Dandridge v. Scott**, **#3:18-CV-51, (W.D. Va. 9/5/19) (Conrad). Chap. 7. Discussion of Rule 8022.** This was a second motion for reconsideration filed by the Debtor on its appeal from the Bankruptcy Court's approval of a settlement agreement between the Trustee and an investment management firm. The Court discusses the proper interpretation of Rule 8022, its similarity to FRCP 59(e), and the debtor's lack of standing to challenge the approval of the settlement.

B239. **Akers v. Micale**, **609 B.R. 175 (W.D. Va. 9/13/19) (Conrad**). [**Chapter 12] Bankruptcy Court's denial of leave to amend plan for the fifth time and dismissal of the Chapter 12 petition are upheld.** Facts: Confirmation of Debtor's first plan was denied 9/28/17. A hearing was held on 5/16/18 on Debtor's second amended plan. Court learned for the first time that the Debtor owed delinquent real estate taxes of $40,000, but the County was not identified as a creditor and the plan did not provide for the debt. Debtor was unable to provide an accurate estimate of his monthly income, and was borrowing money to run his farming operation. Confirmation of the plan was denied on 5/24/18. On 8/2/18 the Court denied confirmation of a third amended plan because of, *inter alia,* inaccurate expense projections. On 10/17/18 a hearing was held on a fourth amended plan; there were problems with erroneous calculations, a potential foreclosure sale deficiency, objections by two creditors and the Trustee, and the fact that the Debtor had borrowed money in contradiction of the Court's order. On 11/27/18 the Debtor filed a fifth amended plan without being granted leave to do so. On 1/3/19 the Court denied confirmation of the fourth amended plan, finding that the Debtor had failed to establish feasibility as required by sec. 1225; leave to file a fifth amended plan was denied. Held: (1) The lower Court's finding that the proposed plan was not feasible was "not clearly erroneous." The Court was not required to give the Debtor "the benefit of the doubt" where, as here, the Debtor's calculations were proven on numerous occasions to be inaccurate. The fact that the Debtor was current in his plan payments was not dispositive of this issue where the Debtor's ability to make future payments was very much in doubt. (2) The Court is not persuaded that the Debtor had a right to file a new (fifth) amended plan. Sec. 1221 requires the Debtor to obtain leave of Court to file an amended plan beyond the first 90 days. See also sec. 1208(c)(5). Sec. 1223 "does not give the Debtor an absolute and unlimited right to amend a Chapter 12 plan after confirmation is denied." (3) Debtor was required to obtain leave to file a fifth amended plan, so the lower Court's denial is reviewed for abuse of discretion only. The lower Court properly referenced the appropriate factors in making this decision. (4) Regarding the dismissal of the Chapter 12 petition, the lower Court noted unreasonable delays, failure to provide accurate financial information, and multiple opportunities to present a confirmable plan; there was no abuse of discretion. (5) The Bankruptcy Court's decision is affirmed in full.

B239A. **Decker v. Scott (In re Michael Decker)**, 5:19-cv-9 (W.D. Va. 9/18/19) (Dillon) **Chap. 7. Bankruptcy Court's order denying debtor's motion to quash the Trustee's discovery was not a final order and therefore cannot be appealed.** In the Bankruptcy Court, the Trustee filed a motion seeking to examine the debtor and his accounting firm per Rule 2004. The Court granted the motion over the debtor's objections. When the Trustee began issuing discovery requests, the debtor objected; the debtor then sought to quash the Trustee's subpoena *duces tecum*. The Bankruptcy Court overruled the objections, with prejudice, noting that the debtor was using the same arguments he had used in the objection to the 2004 examination. The debtor appealed, arguing that the Court erred by denying his motion with prejudice, which precluded him from raising the same issues at the later stages of the proceeding. The Trustee asked dismissal of the appeal. Although the parties did not raise the issue, the District Court *sua sponte* raised the issue of whether the Bankruptcy Court's order was final and appealable. Held: "The Bankruptcy Court's order denying the motion to quash is not a final order as required for the court to assert jurisdiction pursuant to 28 U.S.C. sec. 158(a)." The appeal was dismissed for lack of subject-matter jurisdiction.

--**Scott v. Decker**, Bankr. W.D. Va., # 17-50297, A.P. 19-05006, 9/30/20 Opinion (Connelly). **(Chap. 7) Amounts transferred as shareholder distributions were property of the state recoverable by the Trustee.** A lengthy discussion of whether the property transferred in this case was property of the estate. Under 541(a)(6), the issue was whether the property was "proceeds, product, offspring, rents, or profits" or earnings performed after the case was filed. If it was the former, the Trustee can recover it; if the latter, he cannot. The Court held that the amounts transferred as shareholder distributions were profits of the stock and were property of the estate which the Trustee may recover.

B240. **Jenny Edwards v. B&E Transport, LLC**, 607 B.R. 530, # 18 62164, AP 19-06026, (Bankr. W.D. Va. 9/25/19), (Connelly). **Court awards compensatory and punitive damages and attorney's fees for post-petition repossession of, and refusal to return, Debtor's motorcycle.** Creditor repossessed Debtor's motorcycle, her primary means of transportation, 2 days after she filed her petition, and demanded payment in full within 10 days, plus repossession costs. The creditor was noticed of the case, and the Debtor personally notified it of the filing. Debtor was current on the motorcycle payments when the case was filed. At no time did the creditor seek relief from the stay. Debtor's confirmed plan provided for payment of the balance on the claim with interest. Both Debtor and her counsel notified the creditor that the repossession was a stay violation, but the creditor refused to return the motorcycle. So the attorney filed this A.P. requesting compensatory damages, emotional distress, attorney's fees, and punitive damages. The creditor filed no response. Held: (1) "This is not a close call: B&E's actions are unquestionably prohibited by statute." (2) The stay violation was willful and knowing; the repossession was deliberate and intentional. The creditor was advised of the filing three different ways; according to the Debtor, the creditor's representative admitted it intended to disregard the Bankruptcy Code. (3) Sec. 362(k)(l) gives the Court authority to award actual damages for a stay violation. The Debtor's testimony established the damages caused her by the creditor's actions. (4) The Court cannot award the Debtor return of the motorcycle because she did not plead an action for turnover under sec. 542. (5) The Court awards actual damages of $14,821.72, $10,000 of which is the purchase price and $4,000 of which is for the cost of replacement transportation. (6) The Court awards attorney's fees of $3,125.65 (hourly rate of $400/hr for the trial work). (7) Damages for emotional distress cannot be awarded because they were not pled in the complaint. (8) For punitive damages, the Court must consider the creditor's conduct, its ability to pay, its motive, and any provocation by the Debtor, and whether the conduct reaches an "egregious and malevolent level" beyond "mere willfulness." The Court finds the $25,000 in punitive damages requested by the Debtor to be reasonable, and approves that amount.

B241. **In re Linda R. Cody**, Dist. Ct. W.D. Va., #7:19-cv-00433, 11/12/19 opinion (Urbanski). **District Court upholds dismissal of Debtor's fourth case in three years.** Debtor filed four Chapter 13 petitions since 2016 in an effort to save her real estate from a city tax sale; three of them were filed one day before a scheduled sale; all four petitions were dismissed. After dismissal of the third petition, the Debtor was ordered not to file another petition for 180 days; she filed the fourth petition 177 days later. She failed to file the required documents or take the credit counseling course before filing the last petition. The City of Roanoke sold the property despite the filing of the fourth case, and later obtained an order confirming the sale. The Debtor is due $30,470 after the taxes have been paid from the sale. Debtor appealed the Bankruptcy Court decision but failed to obtain a stay. Held: (1) Debtor did not qualify as a debtor under sec,. 109(h)(1) because she failed to take the credit counseling course and didn't meet one of the statutory exceptions, so dismissal was appropriate. (2) The Bankruptcy Court did not abuse its discretion in dismissing the case for violating the 180 day bar and in finding that her excuse that inclement weather and a national holiday caused her to file early was insufficient. (3) The Court's finding of bad faith and inability to propose a confirmable plan do not rest upon a "clearly erroneous factual finding," and was therefore not an abuse of discretion. (4) The dismissal is affirmed.

(appeal from Cody v. Micale, 7:19-MC-4, (W.D.Va. 6/10/19)

B242. **In re Nathaniel Grooms**, Bankr. W.D. Va., # 19 – 62110, 11/21/19 Order (Connelly). **Court denies Debtor's counsel's motion to vacate the dismissal of the case for failure to timely file a plan.** Debtor failed to timely file the plan after having filed a bare bones petition and received a deficiency notice from the Court. Because no motion to enlarge the time was filed, pursuant to Rule 3015(b) the case was dismissed. Debtor's counsel then filed the plan and a motion to reconsider and vacate the dismissal order, arguing that the order should be vacated based on Rule 9024(b)(1) [sic;

really FRCP 60(b)(1)] and the excusable neglect of counsel. Held: (1) Under Augusta Fiberglass Coatings, 843 F. 2d 808 (4th Cir. 1988), the movant must show a "meritorious defense." But here dismissal was mandated by the Bankruptcy Code [1307(c)(3)]. The only meritorious defense in this case would have been "that the plan was timely filed," and it wasn't. (2) There is therefore no basis to vacate the dismissal order. (3) Counsel's lack of review of the filings and the other matters on the Court's deficiency order "is not a product of excusable neglect but a neglect of the expected obligations of an attorney representing Debtors in this Court." (3) (Fn) This sort of behavior may implicate the Virginia Rules of Professional Conduct [preamble, 1.1, 1.3(a)] (4) Standing Order 15-1 covering debtor attorney fees requires the proper filing of all necessary schedules, etc., which include a plan such as this one. (5) There is no excusable neglect in this case because counsel had been previously alerted of his neglect and the associated deficiencies with his electronic filing in a prior case, so his "failure to subsequently take action to reconcile his filings against the Court's deficiency order is indefensible."

B243. **In re Wesly and Christina Laws (Laws v. Carilion Clinic**), Bankr. W.D. Va., #19-70593, AP # 19-07030, 11/22/19 Opinion (Black). **Court awards compensatory (but not emotional distress) damages and attorney's fees, for creditor's violation of the automatic stay.** Carilion had continued to send bills (eight) to the Debtors and contact them even after the case was filed, and even after the debtors and their counsel had advised it of the pending case. Debtors filed an Adv. Proceed. against Carilion for violation of the automatic stay of sec. 362(a). The defendant failed to answer, so the Debtors filed a motion for default judgment. An evidentiary hearing was held, at which the defendant did not appear. Held: (1) A party seeking damages under sec. 362(k)1) must establish three elements: a violation, committed willfully, that caused actual damages. Debtor must show the willful violation (which can be an intentional act with knowledge of the automatic stay) by clear and convincing evidence; there is no need to show a specific intention to violate the stay. (2) The evidence shows by clear and convincing evidence that Carilion willfully violated the stay. (3) The award of actual damages is mandatory upon a finding of a willful violation; the debtors must prove actual damages by a preponderance of the evidence, based on "concrete, non-speculative evidence." (4) Wife is awarded $300 for lost time from work dealing with this matter. (5) Attorney's fees of $1,875 ($350/hr.) were necessary and reasonable, and are awarded. (5) There is insufficient evidence to establish an award of emotional distress damages; there was no corroborating evidence to Wife's testimony regarding her resulting distress.

Comer v. Carilion Clinic (In re Comer), #19-70593 (Bankr. W.D. Va., 11/22/19 Opinion (Black) Court awards damages for violation of the automatic stay for lost work and attorney's fees, but not for emotional distress. The Debtors filed a motion for default judgment seeking damages against a creditor for violation of the automatic stay. Carilion sent invoices and left collection phone messages for prepetition services even after the Debtor provided them with the bankruptcy filing information. The Court found that the creditor willfully violated the automatic stay of 11 U.S.C. § 362(a) by seeking to collect the balance owed for pre-petition services after receiving notice that the Debtors filed bankruptcy. The Court awarded the Debtors $300.00 in lost work time damages and attorneys' fees in the amount of $1,875.00. However, the Court found that there was insufficient evidence to award the Debtors damages for emotional distress. The Court found that Carilion "willfully violated the automatic stay of 11 USC § 362(a)" and awarded $300 in actual damages and $1,875 in attorney fees.

B243A. **In re Victor Dandridge (Scott v. 1105 Inglecress, LLC)**, Dist. Ct., W.D. of Va., 2019 WL 4228457, # 3:19-mc-00006, A.P. 6:19-ap-06025, 11/26/19 Opinion (Conrad). **Chap. 7. A defendant in a fraudulent transfer action who did not file a claim is entitled to a jury trial in the District Court.** Chapter 7 Trustee filed an A.P. seeking to recover the property, or the value paid for it, from the sale of Debtor's real estate ten months before this case was filed. The Trustee sought to avoid the sale as a fraudulent transfer under sec, 548(a)(1)(A); to hold the defendants liable under sec . 550 to preserve the property under sec. 551; to assert a claim for disallowance under sec, 502(d); and to recover the property under sec. 542. The defendants filed a jury demand, but declined to consent to a jury trial in the Bankruptcy Court; the defendants timely moved to withdraw the reference of the A.P. to the Bankruptcy Court. Held: (1) The Court finds cause to withdraw the reference of this A.P. (2) "The Supreme Court has held that a defendant in a fraudulent-transfer action

brought by the trustee is entitled to a jury trial if it has not filed a claim against the bankruptcy estate. *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33 (1989). So these defendants are entitled to a jury trial. (3) Because the defendants have not consented to a jury trial in the Bankruptcy Court, that Court may not preside over a jury trial, and the reference must be withdrawn. (4) The withdrawal will be done immediately to promote judicial economy, avoid duplicative efforts, etc.

B244. **Cave v. Wells Fargo Bank**, Dist. Ct., W.D. Va., #19-cv-00024, 12/6/19 Opinion (Moon). **[Chap. 7 case] District Court dismisses debtor's bankruptcy-related claims against creditors because they were insufficiently related to the bankruptcy proceeding.** Chapter 7 debtor filed a Federal Court complaint against a bank, a debt collector, and mortgagee alleging an FDCPA claim and violations of the automatic stay and discharge injunctions. The defendants moved to dismiss under FRCP 12(b)(6). The debtor requested that the case in its entirety be transferred to the Bankruptcy Court. Held: (1) Bankruptcy Courts cannot exercise supplemental jurisdiction under 28 USC section 1367(a) to hear claims that do not otherwise qualify under sections 1334(b) and 157. (2) In the post-confirmation context, the Fourth Circuit has found that a "close nexus" must exist between the claim and the original bankruptcy case in order for the two to be considered "related" for jurisdictional purposes. (3) The FDCPA claim took place after discharge and is therefore not sufficiently related to the Chapter 7 case for purposes of section 157(b)(1), because it will not benefit the estate or vindicate any rights protected by the Bankruptcy Code. Therefore the Court has no ability to refer the claim. (4) There is no private right of action for a violation of a Bankruptcy Court's automatic stay and discharge injunction pursuant to sec. 524(a)(2); the only remedy is to file a civil contempt motion in the Bankruptcy Court. (5) Regarding the fraud claim, plaintiff's reliance on the defendants' alleged misstatements, while possibly "understandable," was not "reasonable." (5) Defendants motions to dismiss are granted. [Virginia Lawyers Weekly case summary]

B245. **Allen v. Fitzgerald**, Dist. Ct., WD of Va., #5:18-cv-00057 & 7:18-cv-00134, 12/11/19 Opinion (Urbanski). **Bankruptcy Court's sanctions against Upright Law and local attorneys mostly upheld.** The District Court declined to undo $5,000 in sanctions and practice suspensions imposed by the Bankruptcy Court against Virginia attorneys Darren Delafield (one year and $5,000) and John Morgan (18 months and $5,000) for their involvement with Chicago-based law firm UpRight Law, LLC. The Court also upheld the five year practice suspension of two Illinois attorneys who managed Upright Law., ruling that the Bankruptcy Court had the power to sanction out of state lawyers even though they had never personally practiced in Virginia. The Court reasoned that the Bankruptcy Court had "inherent authority" under section 105(a) to sanction litigants for bad faith conduct, to enforce its orders or rules, to prevent an abuse of process, and to hold parties in civil contempt as long as procedural due process has been observed. It noted that the non-lawyer employees of the defendants "consistently engaged in the unauthorized practice of law affecting the Bankruptcy Court," and the defendants engaged in litigation misconduct. Regarding the $300,000 fine levied by the lower Court against the Chicago firm, while the Court could not conclude that the fines were excessive, it held that the trial court must first review the parties' ability to pay before levying such a large penalty, and it remanded that issue for an evidentiary hearing. [Virginia Lawyers Weekly case summary] **[For 2/12/18 Bankruptcy Court opinion, see #B213.]**

B245A. **In re Wright,** 19-71163 (Bankr. W.D. Va. 12/13/19) **Contempt Motion for Stay Violation**
Creditor filed a Warrant in Debt against debtor postpetition and phone-called and emailed numerous times. The court found the creditor in violation and awarded actual lost time damages and attorney fees. The court declined to award any damages for emotional distress.

B246. **In re April Long**, Bankr. W.D. Va., #14,50317, 12/16/19 Order (Connelly). **Rule 9011 sanction imposed on Debtor's counsel; Debtor to receive discharge despite having filed inaccurate schedules.** Debtor's 100% plan was modified post-confirmation to pay 22% based upon amended Schedules I and J. A creditor and the Trustee questioned whether the Debtor should receive a discharge because she allegedly omitted material information regarding her household income on those amended schedules. Evidence at a hearing suggested that there may have been problems with these schedules. The Court suggested that there might have been Rule 9011 violations in this matter, and set

another hearing. The testimony at the later hearing established that the amended schedules were based on untruthful financial information and were filed without the attorney making a reasonable investigation into the accuracy of the filings; that the Debtor had provided correct pay information to two non-attorney assistants in the firm; that an attorney had not reviewed this information even though it was in the file, and had not investigated its accuracy; and that the attorney had intentionally concealed the fact that another adult with steady income was in the household when the amended schedules were filed. Held: (1) The amended plan was based on a false and misleading financial picture. (2) The attorneys failed to perform a reasonable investigation into the accuracy of the amended schedules. (3) The attorneys provided inadequate supervision of the non-lawyer assistants. (4) The attorney's defense that he had been advised by the Trustee's staff attorney that he need not count such additional income when calculating the means test fails because the firm filed a false amended Schedule I and J, and because there was no showing that the staff attorney's alleged statements were "accurate statements of the law." (5) These actions --filing inaccurate schedules, failing to verify the information upon which they were based, failing to show the schedules were consistent with applicable law, and filing an amended plan based on false and misleading schedules—constitute a violation of Rule 9011. The Court imposes a monetary sanction of $1,450 on the Miller Law Group, P.C., to be paid to the Clerk of the Court within 60 days. (6) The Trustee subsequently withdrew his motion to dismiss the case; the Court declines to dismiss the case and overrules the objections to discharge, and an order of discharge will be entered.

B245B. **In re Collins,** #15-71683 (Bankr. W.D. Va. Dec. 16, 2019)*(Judge Black).* **(Chapter 13 converted to Chapter 7) Settlement Agreements and Rule 9019** Background: This matter came before the Court on a motion to enforce a settlement agreement to resolve a disputed claim and require the Trustee to present the settlement for Court approval under Rule 9019. The Trustee asserted that the settlement agreement was only tentative as it was subject to conditions precedent that were not satisfied. The case was further confused by the debtor's failure to fully disclose all litigation with the initial schedules. The Court found that the parties had entered into a binding settlement agreement, citing basic offer and acceptance contract law. The Court noted that a "settlement cannot be set aside merely because the Bankruptcy Court has not yet approved it." But it also confirmed that "a settlement is only enforceable if the bankruptcy court has approved it." However, a further hearing would be needed for the Court to approve the settlement agreement as fair and equitable and in the best interests of the estate. Holding: The Trustee and creditor "formed a valid contract" to settle the litigation, even though initially only oral. The settlement must be approved by the Court pursuant to Rule 9019.

B247. **Hutchinson v. First Cmty. Bank (In re Hutchison**), 2020 Bankr. LEXIS 250 (Bankr. W.D. Va. Jan. 30, 2020) (Black, J.) **Application of statutes of limitation to various bank notes.** Facts: Individual chapter 11 debtor initiated an adversary proceeding by the filing of a complaint against First Community Bank (the "Bank"), seeking declaratory relief and requesting the Court determine whether the claims filed by the Bank were barred by the applicable statute of limitations, and if not barred, determine the amounts owed to the Bank, as well as to determine the validity of the claims and deeds of trusts. The Bank filed a motion for partial judgment on the pleadings pursuant to Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(c), stating that each claim was based upon a note and under applicable law the statute of limitations for enforcement of the notes was six years after the due date or dates stated in the notes, or if accelerated, within six years after the accelerated due dates. The Bank filed a total of five claims, all of which were secured, at least in part. Held: Motion for partial judgment on the pleadings granted as to three of the claims since they were not barred by the applicable statute of limitations and the debtors' relief requested on that basis was dismissed. In reaching its decision, the Court found that it was appropriate to apply the statute of limitations for notes to the obligations akin to a note even if not actually titled as such. Since the notes at issue for these claims had not come due by their terms, and no due date was accelerated, the statute of limitations had not yet begun to run as to Claims 1 and 3 and as to Claim 5 there were insufficient allegations in the Complaint to establish that the statute of limitations had run.

B248. **Scott v. SunTrust Bank, N.A. (In re Runnymede Capital Mgmt.*),*** 2020 Bankr. LEXIS 1380 (Bankr. W.D. Va. Jan. 31, 2020) (Connelly, J.) **Chap. 7 case) Rulings on issues arising from the Trustee's efforts to avoid certain transfers to the**

bank as fraudulent. Chapter 7 Trustee filed a complaint against the Bank to avoid and recover transfers made to it that were allegedly actually fraudulent or constructively fraudulent. The Court provides a detailed discussion of issues involving initial and subsequent transferees, undoing a transfer, the effect of deposits and overdrafts on what constitutes a "transfer," Va Code sec. 8.4-302(a), and final payments vs. provisional payments

B249. **Hall v. JP Morgan Chase Bank, N.A.**, 2020 Dist. LEXIS 20775 (W.D. Va. Feb. 7, 2020) (Dillon, J.) **(Chap. 7 case)** In 2010, the Halls purchased a home as tenants by the entirety. The purchase was financed, and the note and deed of trust were only signed by Mr. Hall. The Halls later filed for bankruptcy relief under chapter 7 and received their discharge in December 2012. In July of 2015, JP Morgan Chase Bank, N.A. ("Chase") filed a complaint in Circuit Court asserting that the deed of trust signed by Mr. Hall was valid or, alternatively, that the state court could reform it to make it valid. The Halls filed a motion to reopen their bankruptcy case and requested sanctions against Chase be entered for its violation of the discharge injunction. The Bankruptcy Court granted a temporary injunction as to the state court action, until it could resolve the motion. The Bankruptcy Court noted that a main issue in the decision of whether to enjoin the state-court action permanently or to grant sanctions turned on whether Chase had a valid deed of trust against the property. It modified the temporary injunction to allow the state court to consider whether the deed of trust was valid. It also held that if the court found that Chase had any in rem rights to the property, the discharge did not affect those rights.

The state court held that the deed of trust was invalid and unenforceable since the deed of trust and note were only signed by Mr. Hall although the property was owned tenants by the entirety. The state court also held that the deed of trust could not be reformed. The Halls were divorced and therefore, at that point, they no longer owned the property as tenants by the entirety, but rather owned it as tenants in common. Based on the change of ownership, Chase filed another complaint with the state circuit court, this time to Mr. Hall only, and requesting a foreclosure of Mr. Hall's interest. Chase argued that the deed of trust is valid as to Mr. Hall's interest based upon the after-acquired property provision, Va. Code Ann. § 55-52 (this section was later repealed but was in effect through the date the court issued the order on appeal. The same language is now located at § 55.1-310). In response to this complaint, the Halls requested the Bankruptcy Court reopen their bankruptcy case and sought to enjoin Chase from proceeding in state court and hold them in contempt. The Bankruptcy Court denied the motion, which decision the Halls appealed.

Held: Affirmed. Chase was free to pursue its in rem rights under the deed of trust, including pursuit of a foreclosure as to Mr. Hall's interest in the property and partition by sale since the discharge injunction only extinguished Chase's right to pursue in personam relief. The District Court also rejected the argument presented by the Halls that even if the deed of trust was valid prior to the bankruptcy filing, the bankruptcy resulted in the voiding of the deed of trust and that any attempt to foreclose by Chase was a discharge violation. In making this point, the Halls asserted that the Bankruptcy Code treats deeds of trust like judgment liens and if a creditor dockets a judgment but it does not attach to any property before the debtor receives a discharge, the judgment is voided pursuant to § 524(a)(1). Thus, even if the deed of trust was I-21 valid, the Halls argue that it did not attach to the property when they filed for bankruptcy relief and therefore could not attach after they received their discharge. While the District Court noted this was an interesting comparison, they cited no authority that supported this position. The District Court concluded that there was a considerable distinction between the two (deeds of trust and judgment liens), such as one being voluntary and the other involuntary. The District Court concluded that although the deed of trust had not yet attached at the time the bankruptcy case was filed, it was a consensual agreement between Mr. Hall and the lender that his interest in the property would secure the lender's debt. [Summary by attorney David Gaffey for the 2020 Mid-Atlantic conference.]

B250. Hegedus v. Nationstar Mort. LLC, 2020 U.S. Dist. LEXIS 34370 (W.D. Va. Feb. 27, 2020) (Urbanski, J.) **Automatic stay protections intended to act as a shield for debtors, not a sword.** Facts: Prior to their filing for bankruptcy relief, the debtors had a pending matter before the U.S. District Court for the Western District of Virginia against First Horizon Home Loan Corporation ("First Horizon"). Although their bankruptcy case was filed in November of 2018, at a time when the District Court matter was pending, they did not list the pending suit/claim in their bankruptcy schedules (they argued that the counsel failed to include it). In December of 2018, the District Court dismissed the case with prejudice and later denied a request for relief pursuant to Fed. R. Civ. P. 59 (in January 2019). The debtors then filed a motion to

reopen the case filed in January 2020 and argued that grounds existed pursuant to Fed. R. Civ. P. 60 in that the automatic stay was in place at the time the District Court dismissed the case with prejudice and denied the motion for relief pursuant to Fed. R. Civ. P. 59. Held: Motion denied. The District Court noted that the protections afforded by the automatic stay were not intended to affect claims brought by debtors, such as those asserted by the debtors in this matter, since it was not a matter against the debtor but rather initiated by the debtor. Since the stay did not apply to void the Court's previous rulings, Rule 60 provided no basis for the relief requested. [Summary by attorney David Gaffey for the 2020 Mid-Atlantic conference.]

B251. **Craig v. Bendall**, 2020 U.S. Dist. LEXIS 43950 (W.D. Va. Mar. 13, 2020) (Kiser, J.) **Stay granted pending appeal where property owner who was not on the note was seeking to stop a foreclosure; ruling on request for relief from the automatic stay was not a final order.** Facts: Appellant Teresa Craig resides in a home that was deeded in July 2007 from Lucy Charles Bendall to Charles E. Kober and he signed a note that obligated him to pay Mrs. Bendall $120,000, which was secured by a recorded deed of trust against the property. In October of 2012, Mr. Kober transferred the home to Ms. Craig via a quitclaim deed but continued to pay on the note owed to Mrs. Bendall until November 2018, when he defaulted and foreclosure proceedings were initiated (the note was inherited and held by her sons, Charles Hunter Bendall and Robert Paschall Bendall, III). Ms. Craig filed for chapter 13 relief, and proposed a plan that sought to modify the note on the property. In that plan, she proposed to pay a monthly sum until the property was sold or refinanced, with a deadline to do so within 24 months, at which time the balance owed on the note would be paid in full. The Bendalls objected to the plan, and the Bankruptcy Court called into question whether it had jurisdiction to consider the matter, since the debtor was not the maker of the note, according to Ms. Craig. The Bankruptcy Court granted relief from the stay and ordered Ms. Craig to sell or refinance the property within 120 days or the Bendalls could foreclose on the property. Ms. Craig appealed the Bankruptcy Court's ruling and sought a stay pending her appeal. Held: Stay pending appeal was granted based on Ms. Craig's showing that the four factors set forth in *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987). While the Court noted that the first factor, the likelihood of success, was the closest question for the Court, but the District Court concluded that since the claim at issue was against either the debtor or her property, and thus was a claim of the debtor and thus subject to the Bankruptcy Court's authority under § 1322.

> *See*, Craig v. Bendall, #4:19-CV-00048 (W.D. Va. June 16, 2020) (appeal dismissed for lack of jurisdiction because the Bankruptcy Court order was not yet a final order. Admitting that "denial of relief from the automatic stay is a final, appealable order" but finding in this case the bankruptcy order did not grant or deny relief from the stay, the Court said the order instead "set forth a set of circumstances that, if Craig fails to fulfill, will result in relief from the automatic stay." Because it was not yet a final order, the court has no jurisdiction to entertain the appeal.) [Summary by attorney David Gaffey for the 2020 Mid-Atlantic conference.]

B252 **Hurston Law Offices, PLLC v. Briggman** , #5:19-cv-60, (Dist. Ct., W.D. Va. July 21, 2020) **Validity of attorney's lien on litigation proceeds [Chapter 7 case]** "This is an appeal of an order by the United States Bankruptcy Court for the Western District of Virginia pursuant to 28 U.S.C. § 158(a)(1) and Federal Rule of Bankruptcy Procedure 8002. On August 6, 2019, the bankruptcy court entered an order denying appellant Hurston Law Offices, PLLC's ("Hurston") assertion of a secured attorney lien on the proceeds of litigation settled by the chapter 7 trustee … For the reasons that follow, this court AFFIRMS the bankruptcy court's August 6, 2019 order.

… Following review of Hurston's memorandum, the bankruptcy court entered its order finding that Hurston had failed to perfect the lien because he did not provide written notice to the opposing parties prior to the filing of the bankruptcy petition, as required by Virginia Code § 54.1-3932. The bankruptcy court alternatively found that providing notice by filing the proof of claim and objection "was simply too late to establish priority over Mr. Briggman's other unsecured claims in the distribution of the settlement proceeds. Because the automatic stay operates to void 'any act to create, perfect, or enforce any lien against property of the estate . . . even if Hurston's notice was sufficient notice to perfect the lien, Hurston's post-petition actions would be void." ECF No. 11-1, at 71. The bankruptcy court found that Hurston only

had a claim for attorney's fees as an unsecured claim. Hurston then filed the present appeal, asserting that the bankruptcy court erred in its opinion.
… Accordingly, Hurston did not have a valid attorney lien for the work completed prepetition.
… "The court agrees with the bankruptcy court and finds that any act by Hurston to perfect his lien post-petition for any work completed prepetition is in violation of the automatic stay and is void. See 11 U.S.C. § 362(a)(3), (4).
… Hurston does not have a valid attorney lien for the work he conducted on behalf of Briggman or the bankruptcy estate."

In re Phyllis Johnson, #18-71446 (Bankr. W.D. Va. July, 27, 2020)(Judge Black) **Claims Objection; burden of proof; Va. Uniform Partnership Act**. *Background:* The Debtor filed an objection to a proof of claim filed by the Debtor's business partner disputing that the Debtor was liable to the creditor for any amount for reimbursement of various sums, including capital contributions made in a joint venture arrangement, unpaid real estate taxes, attorney's fees, improperly taken commissions, and other matters related to a real estate investment. The claim arose out of a largely undocumented joint venture (an "implied contract for a joint venture") between the Debtor and the creditor, which soured over time. The arrangement was that the creditor would provide most of the funds to purchase and renovate properties and the Debtor would provide her experience to rehabilitate and maintain the properties. The objection to claim was sustained in part and overruled in part. This is a fact specific opinion discussing in very helpful detail the burden of proof on objections to claims and the Virginia Uniform Partnership Act. Certain portions of the claim were allowed, and others will be paid upon the sale of the real estate or upon settlement of the partnership accounting and were thus disallowed in the Debtor's bankruptcy case. Holding: The Court found that the creditor's capital contributions of $108,000 would be paid from the sale of real estate and not by the Debtor's plan. The Court reduced the $15,373 paid in real estate taxes and the $24,239 currently owed for real estate taxes by "the proceeds from the sale of the properties and the settlement of the partnership accounting." The Court denied much of the creditor's claim but found that he met his burden of proof as to $15,600 loan and $17,246 in management fees.

B253. **In re Mary Rosenberger (Baker v. Rosenberger)**, Bank. WD Va, #20-50093, 9/29/20 Opinion (Connelly) [**Chapter 12] Court holds that the Debtor qualifies under Code sec. 109(f) and 101(18) as a family farmer.** Issue: Does the debtor qualify as a chapter 12 debtor under sec. 109(f), and does she meet the definition of "family farmer" in sec. 101(18)? Facts: The debtor claims a 50% ownership interest in a joint farming venture. A creditor filed a motion to dismiss, alleging that she is not actively engaged in the farming operation, and that she did not derive at least 50% of her income from the farming operation in the prior taxable year. Held: (1) The debtor need only be engaged in a farming when the case was filed, not continuously throughout the case. (2) The Court must decide to what extent a qualifying "family farmer" must be involved in an already-established "farming operation." (3) Most courts apply a totality of the circumstances test when determining whether an activity constitutes a farming operation, using a 7 prong test. This Court agrees that this test is instructive in answering the question here. (4) The burden is on the debtor to show that she qualifies as a family farmer, so she must meet all five elements of sec. 101(18)(A). (5) The debtor testified to her involvement in the operation-- tending to the livestock, maintaining the books, obligating herself on farm-related debts, and living on and owning the property--and the Court finds that she was actively involved in the farming operation. (6) It was not dispositive that she did not own the cattle on the farm. (7) She explained her reporting farm income on her federal income tax return for 2019 but not several other years, and allowing her partner to claim all the income in those years, as an effort to obtain a better tax refund for herself. While this is "concerning," it does not disprove her engagement in the operation. (8) As for the requirement that 50% of her income come from the farming operation, the issue is whether her Social Security income should be included in "gross income" under sec. 101(18), a term which the Code does not define. Her farm income for 2019 was $31,602; her non- farm income was $38,226. (9) This Court agrees with the Fuentes opinion (C.D. Cl. 12/16/11) that the Tax Code's definition of gross income will guide this issue. That Court held that Social Security income is only included in "gross income" to the extent provided by the Tax Code. (10) Under 26 USC sec. 86(c)(1), since one-half of this debtor's benefits plus her "modified adjusted gross income" for 2019

did not exceed the "base amount" of $25,000, the Tax Code dictates that none of her Social Security income should be included in her gross income for 2019. (11) So the debtor satisfies the 50% test of sec. 101(18). (12) The creditor's motion to dismiss is denied.

B225. **Scott v. Decker**, 623 B.R. 417 (Bankr. W.D. Va. 9/30/20) **(Chapter 7 case) Property of the Estate and Shareholder Distributions.** "This dispute in this chapter 7 bankruptcy case is over property of the estate and the limits of the 'earnings exception' to the definition of property of the estate … If the property transferred is 'proceeds, product, offspring, rents, or profits of or from property of the estate,' section 541(a)(6) defines it as property of the estate, and the trustee may recover it. Conversely, if it is 'earnings from services performed by an individual debtor after the commencement of the case,' section 541(a)(6) excepts it from property of the estate, and the trustee may not recover it." Id. at page 1-2. At issue were two questions. "First, if all of the stock in a personal services S Corporation is owned by one individual who files a chapter 7 bankruptcy, are all funds held by the S Corporation 'earnings from services performed by an individual debtor after the commencement of the case,' regardless of when the services were performed? Second, if all the shares of stock of an S Corporation are property of the estate, are shareholder distributions made postpetition property of the estate as 'proceeds, product, offspring, rents, or profits' from the stock? Id. at 3. "This Court holds that as a matter of law funds received by, or held by, WAC that are attributed to earnings from services performed prior to the commencement of the case and transferred to Mr. Decker or to Winchester Accounting after the petition, are not 'earnings from services performed by an individual debtor after the commencement of the case.' " Id. at 21. These amounts include, at the time of filing, retained earnings ($56,937), accounts receivables ($47,055), money in the bank account ($1,064), (a total of $105,056) and, some portion of the 187 invoices issued just after filing, and shareholder distributions derived from earnings from services performed prior to the petition date. Also, the Court pointed out that, "The stock is property of the estate, and as such the Trustee has right, title, and interest in the stock (and to any distributions to the stockholder), despite the debtor's charge that the Trustee has failed to take possession of the stock." Id. at 24. After much analysis, the court held that $98,500 in postpetition shareholder distributions were property of the estate and may be recovered by the Trustee. Id. at 33, 43.

In re Wetter, 620 B.R. 243 (Bankr. W.D. Va, 10/14/20 Opinion (Black). (**Chapter 7). Conversion from Chapter 7 to 11 denied where grounds for conversion or dismissal would be triggered immediately.** The Court denied the Debtor's motion to convert his chapter 7 case to chapter 11 in order for the Debtor to take advantage of the new Subchapter V provision. The Debtor listed as tenants by entirety his interest in JBW Investments, LLC, which owns 4 parcels of real estate worth approximately $1.8M. He testified that such real property was transferred on January 1, 2018, more than a year before he filed his chapter 7 bankruptcy case on July 31, 2019. The chapter 7 trustee discovered that the transfer actually took place on September 25, 2018, less than one year before filing his case. Then it was discovered the Debtor had transferred a 50% interest in JBW to his husband and moved his 50% interest into a trust in September 2016. Citing to Marrama v. Citizens Bank of Mass., 549 U.S. 365 (2007), the court pointed out that ""a debtor who acts in bad faith may forfeit his right to relief under the Bankruptcy Code..." Without relying upon the Debtor's alleged bad faith, the Court denied the motion to convert because such conversion would put the Debtor into default under the requirements of Section 1121(e)(2) and/or 1188(a) and 1189 (b). The court noted that "conversion should not be permitted where grounds for conversion or dismissal would be triggered immediately."

B254. **Thomas, et al, v. Midland Funding, LLC (In re Thomas***)*, 16-50612, Adv. Pro. 17-05010-RBC, 2020 Bankr. LEXIS 3019 (Bankr. W.D.Va. October 28, 2020) (Connelly) **The issue of whether a creditor's claim filing practices violate the FDCPA cannot be decided on a motion for summary judgment; Rule 3001 may not cover more general violations of the FDCPA.** This is a summary judgment ruling in an A.P. about practices of filing claims. The Debtors allege that the creditor violated the FDCPA by filing claims that do not comply with Rule 3001 and by employing false and misleading conduct in the filing of its claims. Midland filed claims for open-end credit accounts owed to Synchrony Bank, which claims stated they were entirely unsecured principal and include nothing for interest or fees. After the plaintiffs filed A.Ps against Midland, it fled amended claims which noted that the claims included interest and other charges. Held: (1) The Court grants the creditor's motion to dismiss as to the claims under 15 USC sec. 1692e regarding its amended proofs

of claim, but denies the motion as to its original proofs of claim, and denies the motion to compel arbitration. (2) Based on the Supreme Court's ruling in *Midland Funding v. Johnson (2017),* Midland claims that the FDCPA is inapplicable to the allegations in the complaint because the Bankruptcy Rules provide the exclusive means to address the purported misconduct (violation of Rule 3001). It also relies heavily on *In re Derby,* an EDVA case that addressed similar issues and held that the Bankruptcy Code and Rules provide the exclusive means for addressing the allowance of claim and the creditor's misconduct where the creditor's alleged misconduct involves the filing of a claim for a debt that would be enforceable under state law. (3) But the complaint here also alleged violations of the FDCPA for the use of false, deceptive, and/or misleading representations in connection with the collection of a debt. (4) The inquiry under Rule 3001 ("how the amount claimed should be supported") differs from that under 1692e ("whether the creditor may intentionally make materially false statements regarding the amount claimed"). The creditor has not shown that the former addresses the latter. (5) The second claim, under 1692f, pleads an unfair and unconscionable means to collect the debt: falsely reporting the claim as entirely principal and thereby avoiding itemization. (6) If this case was just about determining the allowance of the claim, the defendant would be correct: the process would be through the Rules. But it is not, and the plaintiff's allegations do not fall within Rule 3001. (7) Because the plaintiffs have described conduct that could violate the FDCPA and is not specifically addressed in Rule 3001, their claims are not precluded by the claims-administration process in the Code and Rules. (8) This differs from the Supreme Court case, because there the claim admitted on its face that the limitations period had run, and the debtors had an affirmative defense, so there was no false, deceptive, etc., conduct by the creditor. (9) The amended claims do not contain false statements and are not misleading. (10) Filing a claim that violates Rule 3001 but is not otherwise false or misleading subjects the claim to the process under 3001(c)(2)(D), and that provides a sufficient means to address unfairness created by violations of the Rule, but not if the practice is to make misrepresentations to avoid compliance with the Rules and obstruct its enforcement. (11) The Court cannot rule that as a matter of law the plaintiffs cannot prevail under the FDCPA claim re the filing of the original proofs of claim, so Midland's motion for summary judgment on that cause of action is denied. (12) The "Claim Breakdown" contained in the amended proofs of claim does not itemize interest, fees, and costs as required by Rule 3001. (13) Because the plaintiffs had to take action to compel Midland to file amended proofs of claim to correct its misstatements, the plaintiffs may seek sanctions for the originally filed proofs of claim under Rule 3001. (14) Midland's summary judgment motion on this matter is denied, as is its motion for the Court to rule as a matter of law to limit appropriate relief to attorney's fees actually and reasonably incurred as of the date the amended proofs of claim were filed. The Court will hear the sanctions issue only after notice and a hearing.

In re Perdomo, Bankr. E.D. Va., # 19-10812-BFK, 11/25/20 Opinion (Kenney) (**Chap. 7 case) Court denies reconsideration of its denial of the Trustee's proposed settlement of an A.P. and a non-dischargeabilty motion.** One creditor filed an A.P. objecting to the debtor's discharge. The Trustee filed an A.P. seeking control over the debtor's companies. The Trustee and the creditor reached a settlement with the debtor and his related companies, and sought Court approval of the settlement agreement. The Court, siding with the U.S. Trustee, and citing the settlement's failure to afford the U.S. Trustee the opportunity to intervene, denied approval of the settlement agreement. It concluded that the agreement violated public policy by allowing the debtor to "buy" a discharge. The Trustee asked the Court to reconsider its denial. Finding that there had been no "manifest injustice" in denying the Trustee's settlement motion, the Court denied the motion to reconsider.

B228. **In re Mark & Lynda Akers (Akers v. Lakeview Loan Servicing and Micale)**, Bankr. W.D. Va. , # 20 70610, 1/15/21 Order (Black). **3002.1 mortgage servicer fees for post-confirmation work is reduced to $300 for filing a proof of claim and $250 for plan review.** Debtors filed motion to review a Notice of Post-Petition Mortgage Fees, Expenses, and Charges ("Notice"), pursuant to Rule 3002.1, asking the Court to disallow or reduce certain charges. Facts: Debtors' confirmed plan provided for Trustee-paid monthly payments and pre-petition arrears of $11,379 to be paid by the Trustee. Lakeview filed a Notice for $650 for "Bankruptcy/Proof of claim fees" ($400 for proof of claim and $250 bankruptcy fee) and $250 for plan review. Debtors objected to the $900 in fees as unreasonably high; Lakewview asserted that the fees were $100 less that that allowed by the Fannie Mae schedule limits. Held: (1) The Fannie Mae guidelines "have some value, but they are not dispositive." (2) The Court cannot adjudicate the reasonableness of these

fees on the basis of the Notice or invoices provided. (3) Neither party offered much in the way of evidence. (4) This Court agrees with Judge Connelly's statement (*In re Crews, 6/23/17 opinion, #16-60898)* that she cannot understand, without explanation or details of the services performed, how charges for filing a proof of claim can be twice the charges for legal review of a plan. That logic applies in this case to the $650 charge for filing the proof of claim, more than double the $250 charge for plan review. There is no explanation or details about the work performed; counsel acknowledged that these are flat fees. (5) Lakeview has not demonstrated that the $650 fee for filing a proof of claim was "reasonable or necessary" under the underlying law or agreement. (6) The fee for filing the proof of claim is hereby reduced from $650 to $300; the $250 fee for plan review is maintained; the total fee to be allowed is $550.

B226. **In re Laron Shannon (Kaltschmidt v. Shannon)**, Bankr. W.D. Va., # 18-61757, AP 20-06025, 2/4/21 Opinion (Connelly) (**Chap. 7**). **Collateral estoppel from a Montana state court judgment for fraud applies and the debt is excepted from discharge under 523(a)(2)(A).** Creditor Kaltschmidt obtained relief from the automatic stay to prosecute his state court action against the Debtor in Montana. The creditor obtained a state court judgment for $224.000 in actual damages and $1,500,000 in punitive damages for fraud, negligent representation, constructive fraud, and breach of fiduciary duty. He then filed this A.P. seeking to have the debt declared to be non-dischargeable per Code sec. 523(a)(2)(A), (a)(4), and (a)(6). The creditor claims that the Debtor lied to him about having been a Marine, and he would not have invested in the Debtor's business had he known the truth. The Debtor does not contest the state court's findings, but because the jury verdict did not specify which facts gave rise to its findings, he argues that he is not estopped from contesting the issue of non-dischargeability. The matter is now before this Court on the creditor's motion for summary judgment. Held: (1) Collateral estoppel / issue preclusion requires the same issues, the same burdens, and one court having already rendered a final judgment on the merits. (2) This Court must look to the preclusion law of the state in which the state court judgment was entered. (3) The Debtor claims he was not afforded a full and fair adjudication of the issues; the Montana Supreme Court says he was. He had no counsel, was not present for much of the trial due to a first-day medical emergency, and the Court refused any further delays after having accommodated several of the Debtor's prior requests. This Court agrees with the Montana Supreme Court ruling on this issue. (4) It is not contested that the Debtor was a party, and there was a final judgment on the merits, in the state court. (5) The state court ruling on the fraud issue mirrored the same elements required under 523(a)(2)(A). The trial transcript and detailed court instructions to the jury are sufficient to identify which facts the jury relied upon. Therefore the last element for collateral estoppel is satisfied. (6) The creditor is entitled to judgment as a matter of law that the Montana debt, and the damages awarded thereon, are excepted from discharge under 523(a)(2)(A). Collateral estoppel does apply to the Montana judgment. (7) It is not necessary to consider the arguments under 523(a)(4) and (a)(6). (8) Summary judgment is granted to the creditor for the non-dischargeability of the debt of $1,724,000.

B227. **Hegedus v. U.S. Bank National Assoc.,** Dist. Ct. , W.D. Va., # 5:20-cv-00040, 2/24/21 Opinion (Urbanski). **(Chap. 7) District Court denies pro se Debtors' appeal under FRCP 60(b) of the Bankruptcy Court termination of the automatic stay.** Debtors appealed the Bankruptcy Court's order denying their request for relief from the order terminating the automatic stay. This Court finds that the Bankruptcy Court did not abuse its discretion and affirms its denial of relief under FRCP 60(b)[FRBP 9024]. Facts: The Debtors claimed a $1 exemption under Code sec. 522(b)(3)(B) for property located in Delaware. Bank of NY Mellon ("BNYM") obtained a foreclosure judgment against the property in Delaware state court, and subsequently filed a motion in the Bankruptcy Court for relief from the automatic stay. The Debtors sought to oppose the motion *pro se*, and alleged that the supporting documents were not authentic, and that BNYM had no standing. The Bankruptcy Court granted the Bank's motion, and the same day the Debtors filed a motion sought to alter the order's language. The Court denied the motion. Subsequently the Debtors filed another motion for relief, arguing that BNYM had never assigned its Delaware foreclosure judgment to US Bank, that their discharge was being violated, and that US Bank would have to obtain its own judgment in Delaware. Held: (1) The standard of review is abuse of discretion for such Rule 60(b) denials. (2) This Court will not reverse the Bankruptcy Court's order granting termination of the automatic stay; the Debtors never appealed that order. But even construing the pro se litigants' motion liberally, the Court can find no meritorious defenses or claims. (3) U.S. Bank had standing to file the motion for relief based on the assignment to it of the BNYM's interest in the Delaware property. The Court was not obligated to

require US Bank to present the original note; courts have routinely rejected the "show me the note" theory. These same arguments were rejected by the Delaware court. (4) In any event, the automatic stay had already terminated by the time the Bankruptcy Court entered its order terminating it, so the granted relief was unnecessary. (5) There was no violation of the discharge injunction; US Bank was proceeding *in rem* only against the property.

Harlow v. Wells Fargo & Co., 5:20-cv-46, (Dist. Ct. W.D. Va 3/9/21). **Reference of the Adv. Proced. withdrawn; mandatory vs. permissive withdrawal; litigation with Wells Fargo over its filing of forbearance notices in Chapter 13.** The District Court granted Wells Fargo's motion to withdraw the reference of the adversary proceeding to the Bankruptcy Court and consolidate the withdrawn case with *Forsburg v. Wells Fargo*. ""Because 28 U.S.C. § 157(d) requires the court to withdraw the reference under these circumstances and because the factors for discretionary withdrawal weigh in Wells Fargo's favor, the court will GRANT Wells Fargo's motion to withdraw the reference and consolidate this case with the Forsburg litigation." The litigation arose from Wells Fargo's practice of placing chapter 13 debtor mortgages into forbearance in response to the COVID-19 pandemic. Harlow filed the adversary alleging that "Wells Fargo unilaterally filed false mortgage forbearance notices in bankruptcy courts across the country without their consent, which place Chapter 13 debtors at risk of having their bankruptcy cases dismissed or denied due to over- or under-payment of their mortgage obligations." The Court provided an extensive discussion of mandatory and permissive withdrawal and the various factors to be considered. "In sum, the court finds that the combination of core and non-core claims and the uniform administration of bankruptcy proceedings do not weigh in favor of either party, and its prerogative to reduce forum shopping and the plaintiffs' other concerns are outweighed by the promotion of judicial economy, efficient use of the parties' resources, and the preservation of Wells Fargo's right to a jury trial."

B229. **Johnston v. Speedway, LLC,** Dist. Ct., W. D.Va., C.A. #7:21cv00100, 4/28/21 opinion (Cullen). **Debtor's suit for wrongful employment termination and violation of sec. 525(b) survives a motion to dismiss, but his claims for breach of contract and intentional infliction of emotional distress do not.** Facts: Debtor was an assistant manager at Speedway for 8 years. In 2020 he became homeless and was living in his car, and in 10/20 he filed a Chapter 13 case. The store manager and district manager gave him permission to use the store address as his personal mailing address. Without the Debtor's permission, a store employee opened a letter to the Debtor regarding his bankruptcy case and gave it to the store manager. Corporate higher-ups were notified, and they decided to terminate the Debtor in 11/21 out of fear that his bankruptcy might cause him to steal money from the company. The Debtor filed suit alleging wrongful termination and a violation of Code sec. 525(b); the suit also included separate claims for breach of contract and intentional infliction of emotional distress. Speedway sought to withdraw the reference of the adversary proceeding to the Bankruptcy Court, and this Court granted the motion to withdraw the reference. Speedway moved to dismiss the case under FRCP 12(b)(6). Held: (1) Johnston has "plausibly alleged" wrongful termination, so that motion to dismiss is denied; Speedway's motion to dismiss the other two claims is granted. (2) Speedway alleges that Code sec. 525(b) does not authorize a private right of action. This section "explicitly confers a right [of action] directly on a class of persons that includes the plaintiff," and provides for no "express enforcement mechanism," so there is no suggestion that Congress "intended to preclude a private remedy for the statute's violation." (3) This Court concludes that "…Congress intended sec. 525(b) to provide for a private right of action and private remedy that the court can award under its sec. 105 authority…" (4) Rule 12(b)(5) is "not a proper mechanism to challenge (or dismiss) a plaintiff's request for a particular remedy," which in this case is an award for emotional distress damages, punitive damages, or attorneys' fees. Speedway's motion as to these requests is denied. (5) Regarding the breach of contract claim, the Court looks to Virginia law [Filak v. George, 594 S.E. 2nd 610 (Va. 2004)], and Speedway is correct that its Code of Conduct does not contain the "type of binding promises" that would constitute a legally enforceable obligation. The breach of contract claims will be dismissed. (6) Regarding the claims for intentional infliction of emotional distress, such claims are "disfavored in Virginia," and there has been no allegation that Speedway acted with "the specific purpose of inflicting" such distress, or that it knew or should have known that such distress would result from the termination. It's not enough that the defendant acted "with tortious or even criminal intent." This count is dismissed.